HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case.

WPMS No. 330 of 2006
Dr. Amar Deep

Vs.

Principal Judge Family
Court Dehradun

Approved for reporting.

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~~Not approved for reporting~~

Date of decision 4-4-2006

Initial of Judge

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

WRIT PETITION NO. 330 (MS) OF 2006

Dr. Amar Deep, S/o Shri R.B. Mauj, R/o 200, Chaudhary Bihari Lal Marg, II, Neshvilla Road, Dehradun.

.....Petitioner.

Versus

1. Principal Judge, Family Court, Dehradun.
2. Smt. Man Mohini Deep, W/o Dr. Amar Deep, R/o 144, Neshvilla Road, Dehradun. .....Respondents.

Sri Pramod Belwal, Advocate for the petitioner.
Mr. Kanwal Jeet Singh, Advocate for the respondent No.2.
Learned Standing Counsel for the respondent no.1.

Dated: 04.04.2006

Hon'ble Rajesh Tandon, J.

By the present writ petition, the petitioner has prayed for a writ of certiorari quashing the order dated 03.03.20006 passed by learned Principal Judge, Family Court, Dehradun in Misc. Case No. 136 of 2005 Smt Man Mohini Deep Vs. Dr. Amar Deep by which application under Order 9 Rule 13 of the C.P.C. has been allowed on payment of Rs. 250 as cost. The ex parte decree dated 31st March, 2001 passed in Original Suit No. 403 of 2002 Amar Deep Vs. Smt Man Mohini Devi has been set aside and Original Suit No. 403 of 2000 has been restored to its original number.

2. Briefly stated, the petitioner was married with respondent no. 2 on 4th April, 1981 at Dehradun in accordance with Special Marriage Act, 1954. Thereafter, the respondent no.2 came to the Fatehgarh, District Farrukhabad U.P. in the parental house of the petitioner after the marriage. However

petition being No. 403 of 2000 under Section 27 of the Special Marriage Act was filed by the petitioner before the learned Civil Judge, Farrukhabad.

3. According to the case of the petitioner, notices were sent to the respondent no. 2 by the court and thereafter on 17th January, 2001 a publication was made in Dainik Aaj published from Kanpur. The case of the petitioner is that in spite of the knowledge by the respondent no. 2, she did not appear in the Court and on 31st March, 2001, Civil Judge (Senior Division) Farrukhabad passed the order granting the decree for divorce. On 25th June, 2002, maintenance proceedings being Case No. 511 of 2002 under Section 125 of Cr.P.C. was filed by Km. Ankita, through her mother i.e. respondent no. 2 legal guardian for the maintenance of her daughter to the extent of Rs. 9000/- per month. The objections were filed by the petitioner.

4. However, during the pendency of Case No. 511 of 2002 filed under Section 125 of Cr.P.C., the respondent no. 2 filed a Misc. Case No. 935 of 2002 under Order 9 Rule 13 of C.P.C. for setting aside the judgment and decree dated 31.03.2006. Along with the application, he has also filed the application under Section 5 of the Indian Limitation Act stating therein that the deponent i.e. Smt. Man Mohini was not aware of the proceeding in Suit No. 403 of 2000 and she came to know on 16th September, 2002, when she received the copy of the petition under Section 27 of the Special Marriage Act on 3rd October, 2000. She moved an application on 23rd September, 2002 and has prayed for recalling the ex parte order.

5. The respondent no. 2 in the meantime also moved an application before the Apex Court for transferring the proceedings at Dehradun and the Apex Court was pleased to pass the order on 15th October, 2004 to the following effect:-

"…. The transfer petition is allowed. Misc. Case No. 74/79/2002 in Petition No. 403/2000 titled "Man Mohini Deep Vs. Amar Deep" pending before the Civil Judge Farrukhabad Uttar Pradesh is directed to be transferred to the Family Court at Dehradun, Uttaranchal.

The Civil Judge (SD), Farrukhabad shall, soon on communication of this order, transfer the record of proceedings in Misc. Case No. 74/79/2002 in Petition No. 403/2000 titled "Man Mohini Deep Vs. Amar Deep" to the Family Court, Dehradun, Uttaranchal.

The parties their respective counsel are directed to appear before the Family Court, Dehradun, Uttaranchal on 6th December, 2004.

No order as to costs."

The proceedings, therefore, were started at Dehradun on transfer having been allowed at the instance of the respondent no. 2. Parties have exchanged their affidavits in reply to the application filed under Order 9 Rule 13 C.P.C.

Principal Judge, Family Court, Dehradun on 3rd March, 2006 has allowed the application filed under Section 5 of the Indian Limitation Act along with the application filed under Order 9 Rule 13 C.P.C.. Learned Judge has pointed out that from the order sheet of the said file, it appears that no personal service was affected on the applicant i.e. respondent no.2 and the case proceeded ex part after publication of the summons in the newspaper *Dainik Aaj.*

Court below has come to the conclusion that there has been no personal service upon the respondent no.2 and the newspaper was published from Kanpur, when in point of fact, the respondent no. 2 was residing at Dehradun as will appear from the transfer application moved before the Apex Court.

Court below has also come to the conclusion that the ground for divorce has also not been discussed and as such an opportunity is required in order to meet the averments made in the divorce petition.

Counsel for the petitioner has submitted that the petitioner has remarried. The said averments, however, has not been specifically mentioned in the writ petition, but the petitioner has argued that he having remarried, the application under Order 9 Rule 13 was not maintainable.

As will appear from the order passed by the District Judge that there was no personal service on the respondent no.2, the newspaper was published at Kanpur, therefore, it cannot be presumed that the respondent no. 2 had any knowledge about the matter published in *Dainik Aaj*. Since the Family Judge has already come to the conclusioin that there has been no personal service on the respondent no. 2, the argument about the remarriage has neither been proved nor can be said to be a rider in the dispensation of justice and the petitioner should have been vigilant before remarrying and he should have taken care in this regard.

Counsel for the respondent Sri Kanwal Jeet Singh, Advocate has referred the judgment of ***Sadan Kumar V. Smt. Indira Bai 1997 A.I.H.C. 391,*** where it has been held as under:-

"12. As observed above, if the principles underlying Section 15 are to be extended to an application for special leave petition to the Supreme Court, then certainly the principles underlying Section 15 would be applicable to an application filed under Order 9 Rule 13, C.P.C. Merely remarrying after the period prescribed under Section 15 the second spouse would not be permitted to say that the

application filed under Order 9, Rule 13 CPC had become infructuous. In fact, it would be adding premium to the act of the person who secured the ex parte decree. It would otherwise be against the public policy that a person who secured the benefit under an ex parte decree is permitted to continue with the benefit of the ex parte decree if the Court is of the opinion the under the circumstances the ex parte decree can be set aside."

High Court has applied the principles under Section 15 of the Hindu Marriage Act and the Court has observed that merely remarrying after the period prescribed under Section 15, the second spouse would not be permitted to say that application filed under Section 5 had become infructuous. The said observations are quoted below:-

"if the principles underlying Section 15 are to be extendfed to an application for special leave petition to the Supreme Court, then certainly the principles underlying Section 15 would be applicable to an application filed under Order 9 Rule 13, C.P.C. Merely remarrying after the period prescribed under Section 15 the second spouse would not be permitted to say that the appliation filed under Order 9, Rule 13 CPC had become infructuous. In fact, it would be adding premium to the act of the person who secured the ex parte decree. It would otherwise be against the public policy that a person who secured the benefit under an ex parte decree is permitted to ocntinue with the benefit of the ex parte decree if the Cour5t is of the opinion that under the circumstances the ex parte decree can be set aside. Therefore, it cannot be said that merely because the wife had remarried and has given birth to a child from the second marriage, the application filed under Order 9, Rule 13 had become infructuous."

Similar view has been taken in ***Smt. Chandra Mohini Srivastava Vs. Shri Avinash Prasad Srivastava and another AIR 1967 SC 581***, where it has been observed as under:-

"(7) We are of the opinion that special leave cannot be revoked on grounds put forward on behalf of the first respondent. Section 28 of the Act inter alia provides that all decrees and orders made by the Court in any proceedings under the Act may be appealed from under any law for the time being in force, as if they were decrees and orders of the Court made in the exercise of its original jurisdiction. Section 15 provides that "when a marriage has been dissolved by a decree of divorce and there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again." These two section make it clear that where a marriage has been dissolved, either party to the marriage can lawfully marry only when there is no right of appeal against the decree dissolving the marriage or, if there is such a right of appeal, the time for filing appeal has expired without an appeal having been presented, or if an appeal has been presented it has been dismissed. It is true that S. 15 does not in terms apply to a case of an application for special leave to this Court. Even so, we are of opinion that the party who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's decree and thus take away from the losing party the chance of presenting an application for special leave. Even though S. 15 may not apply in terms and the first respondent to have married immediately after the High Court's decree,

for no appeal as of right lies from the decree of the High Court to this Court in this matter, we still think that it was for the first respondent to make sure whether an application for special leave had been filed in this Court and he could not by marrying immediately after the High Court's decree deprive the appellant of the chance to present a special leave petition to this Court. If a person does so, he takes a risk and cannot ask this Court to revoke the special leave on this ground. We need not consider the question as to whether the child born to the new wife on May 20, 1965 would be legitimate or not, except to say that in such a situation S. 16 of the Act may come to the aid of the new child. We cannot, therefore, revoke the special leave on the ground put forward on behalf of the first respondent and hereby dismiss his application for revocation of special leave."

Similar view has been taken in ***Tejinder Kaur Vs Gurmit Singh AIR 1988 (1) SC 839***, where it has been observed as under:-

"7. In Chandra Mohini v. Avinash Prasad (1967) 1 SCR 864 : (AIR 1967 SC 581), on somewhat similar facts it was held that though S. 15 in terms does not apply to a case of special leave to appeal to the Supreme Courts, a spouse who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's judgment take away the right of presenting an application for special leave to appeal form the other spouse. It was further held that the successful party must wait for a reasonable time and make sure whether an application for spcial leave has been filed in this Court. Wanchoo, J. speaking for a two Judge Bench said:

"It is true that S. 15 does not in terms apply to a case of anj application for special leave to this Court. Even so, we are

of opinion that the party who has won in the High Court and got a decree of dissolution of marriage cannot by marrying immediately after the High Court's decree take away from the losing party the chance of presenting an application for special leave. Even though S. 15 may not apply in terms and it may not have been unlawful for the first respondent to have married immediately after the High Court's decree, for an appeal as of right lies form the decree of the High Court to this court in this matter, we still think that it was for the first respondent to make sure whether an application for special leave had been filed in this Court and he could not by marrying immediately after the High Court's decree deprive the appellant of the chance to present a special leave petition to this Court. If a person does so, he takes a risk and cannot ask this Court to revoke the special leave on this ground."

8. In the present case, the respondent in the counter affidavit has denied any knowledge of the fact that an appeal had been preferred in the High Court or of its dismissal and therefore, asserts that he was justified in contracting a second marriage on 17th August, 1986 i.e. immediately after the expiry of one month from the date of the decree of dissolution of marriage passed by learned Additional District Judge. This fact is controverted by the petitioner in her affidavit-in-reply. She has placed a copy of the registered notice dated 31st May, 1986 intimating the respondent of the filing of the appeal."

In ***Ranjeet Singh Vs. Ravi Prakash (2004) 3 SCC 682,*** reliance has been placed on the judgment of ***Surya Dev Rai Vs. Ram Chandra Rai (2003) 6 SCC 675,*** it has been held as under:-

"In Surya Dev Rai v. Ram Chander Rai this Court has ruled that to be amenable to correction in certiorari

jurisdiction, the error committed by the court or authority on whose judgment the High Court was exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by indulging in a long drawn process of reasoning, cannot possibly by an error available for correction by writ of certiorari. If it is reasonably possible to form two opinions on the same material, the finding arrived at on way or the other, cannot be called a patent error. As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been, jeld in Surya Dev Rai that the jurisdiction was not available to be exercised for indulging in reappreciation of evaluation of evidence of correcting the errors in drawing inferences like a court of appeal. The High Court has itself recorded in its judgment that –"considering the evidence on the record carefully" it was inclined not to sustain the judgment of the appellate court. On its own showing, the High Court has acted like an appellate court which was not permissible for it to do under Article 226 of Article 227 of the Constitution."

Family Judge having recorded a finding that the respondent no. 2 had no knowledge about the pendency of the proceedings for divorce, I find no illegality in the order so as to interfere under Article 227 of the Constitution of India.

In view of the aforesaid fact, I find no merit in the writ petition.

Writ petition is, therefore, dismissed. No order as to costs.

(Rajesh Tandon, J.)

04.04.2006

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